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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID KERSHAW FICKES,

Defendant and Appellant.

H033363

(Santa Clara County

Super. Ct. No. BB049070)

Defendant David Kershaw Fickes returns to this court for a third time following our reversal of the judgment for sentencing error. In this third appeal, defendant asserts the trial court erred by: (1) using his alcohol consumption on the date of the incident as an aggravating factor; (2) improperly using his prior conviction in aggravation and as a separately sentenced enhancement; and (3) improperly considering the victim's vulnerability as a factor in aggravation.

**STATEMENT OF THE CASE<sup>1</sup>**

This case comes to us for a third time on appeal. The procedural history of the case is as follows. On December 22, 2000, the People filed an information charging defendant with first-degree burglary (Pen. Code, §§ 459, 460, subd. (a) - count 1); and buying or receiving stolen property (Pen. Code, § 496, subd. (a) - count 2), each

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<sup>1</sup> We omit the underlying facts of the case because they are not relevant to the issues on appeal.

occurring on September 26, 1999; annoying a child (Pen. Code, § 647.6, subd. (a) – count 3); and peeking (Pen. Code, § 647, subd. (i) - count 4), each occurring on May 28, 2000. The information also alleged that defendant had suffered one previous serious felony conviction and two prior “strike” convictions (Pen. Code, §§ 667, subds. (a), (b)-(i), 1170.12, 1192.7, subd. (a)).

Prior to trial, defendant moved to sever the September 1999 counts from the May 2000 counts. The court denied defendant’s motion.

Defendant admitted the prior allegations before trial, and the jury convicted him of first-degree burglary (count 1), and misdemeanor peeking (count 4). The jury acquitted defendant of counts 2 and 3.

The trial court sentenced defendant to state prison for 30 years to life. Defendant filed his first appeal. This court reversed the judgment on the ground that the two cases were improperly joined. The opinion states: “the two sets of crimes were not properly joined in the first instance, because they do not meet the requirements of Penal Code section 954. Moreover, defendant suffered substantial prejudice as a result of the improper joinder, affecting his constitutional rights to due process and a fair trial.” (*People v. Fickes* (Sept. 1, 2004, H024898) [nonpub. opn.].) This court remanded the matter and directed the trial court to sever the September 1999 burglary charge from the May 2000 misdemeanor peeking charge.

The two charges were severed, and on the People’s motion, the May 2000 misdemeanor case was dismissed in the “interest of justice.” The 1999 burglary charge remained.

Following a motion to suppress pursuant to Penal Code section 1538.5 that was denied, defendant proceeded to trial. Two days into the trial, over the prosecution’s objection, defendant pleaded guilty to all charges and admitted the prior convictions and enhancements.

On May 5, 2006, the trial court struck one of defendant's prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court imposed the upper term of six years on the burglary count, doubled to 12 because of defendant's prior strike conviction. The court also enhanced defendant's sentence by five years pursuant to Penal Code section 667, subdivision (a)(1), making the total term 17 years in state prison.

Defendant filed his second appeal with this court, asserting the trial court erred in denying his motion to suppress, and that the trial court erred in sentencing him. This court reversed the judgment, and remanded the matter to the trial court for re-sentencing. This court found the trial court erred in improperly using defendant's prior serious felony conviction to enhance his sentence and to aggravate his sentence, resulting in a sentence that was at a minimum four years longer than it should have been under the California Rules of Court.<sup>2</sup>

Following remand, the trial court re-sentenced defendant again to 17 years total, based on the aggravated term of six years, doubled to 12 because of the prior strike conviction, and five years for the prior serious felony conviction pursuant to Penal Code section 667, subdivision (a)(1).

Defendant filed his third appeal, asserting the trial court again erred in his sentencing.

## **DISCUSSION**

On appeal, defendant asserts the trial court erred in his re-sentencing. Specifically, defendant argues the court erred by using alcohol consumption and his prior

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<sup>2</sup> This court calculated the four year difference by the fact that defendant received the aggravated term of six years, doubled to 12 because of a strike conviction, and five years for the enhancement for a total of 17 years. By sentencing defendant to five years on the enhancement, the court should have sentenced defendant to either the midterm of four years, doubled to eight for a total of 13, or the mitigated term of two, doubled to four for a total of nine.

felony conviction as factors in aggravation, two factors that defendant argues were previously considered by this court in the second appeal and deemed to be improper. In addition, defendant asserts the court's use of his criminal history and its finding that the victim was particularly vulnerable were not proper factors in aggravation.

Our analysis of defendant's claim of sentencing error is guided by the applicable standard of review. The California Supreme Court has instructed, " 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Our Supreme Court has further described judicial discretion in the context of sentencing, as follows: "[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] Moreover, discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Here, the record shows that at the re-sentencing in this case, the court considered the following our factors in aggravation: (1) defendant's prior conviction for receiving stolen property; (2) defendant's alcohol consumption on the date of the incident; (3) defendant's prior convictions that were "numerous and of increasing seriousness"; and (4) the victim was particularly vulnerable because the "burglary was early in the morning around 2:00 a.m. when she was at home."

#### ***Defendant's Prior Conviction for Receiving Stolen Property***

With regard to the receiving stolen property conviction, the court considered it only as an aggravating factor pursuant to California Rules of Court Rule 4.421(b)(3), because it was considered a prior prison term; the court did not enhance the sentence

based on the conviction. On the contrary, the court considered defendant's prior conviction for burglary as his prior serious felony for which defendant's sentence was enhanced for five years. Therefore, the court did not dually use defendant's prior burglary conviction to both aggravate and enhance defendant's sentence in violation of California Rules of Court, rule 4.421, as occurred in the prior sentencing.

Based on the court's use of the receiving stolen property conviction to aggravate defendant's sentence, and its use of the prior burglary conviction to enhance his sentence, we do not find the trial court erred, or improperly considered defendant's prior convictions for dual purposes.

### ***Defendant's Alcohol Consumption***

At the re-sentencing hearing, the court stated that it considered defendant's alcohol consumption as a factor in aggravation. Specifically, the court stated that "defendant was aware that alcohol was a 'disinhibiter;' he had educated himself regarding the risk it imposed on his behavior, yet was drinking alcoholic beverages that evening that precipitated the instant offense." The court further stated: "[d]efendant deliberately imbibed knowing it would embolden him to commit the act."

In finding alcohol consumption an aggravating factor, the court specifically cited California Rules of Court, Rule 4.408, which provides: "[t]he enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge." (Cal. Rules of Court, rule 4.408(a).)

As we stated in our previous opinion in the second appeal, "the fact that defendant chose to drink alcohol on the date of the incident knowing that alcohol affects his self-control, [is] a reason that does not qualify as a circumstance in aggravation under the California Rules of Court. (See Cal. Rules of Court, rule 4.421.)" (*People v. Fickes* (Mar. 3, 2008, H030187) [nonpub. opn.]) Indeed, California Rules of Court, rule 4.421

does not include alcohol consumption as a listed aggravating factor for the purpose of sentencing.

However, the omission of alcohol consumption in rule 4.421 of the California Rules of Court, and the fact that we so observed in our opinion in the second appeal does not preclude the trial court from considering alcohol consumption as a factor in aggravation under California Rules of Court, rule 4.408(a) on remand. Here, the trial court specifically cited California Rules of Court, rule 4.408, and stated its reasons for using defendant's alcohol consumption to aggravate the sentence clearly on the record—that based on defendant's history and knowledge of how alcohol affects him, and his known fetish for women's clothes, defendant's choice to use alcohol to embolden him to commit the act in the present case was a factor in aggravation. Rule 4.408 of the California Rules of Court clearly allows a trial court to consider "additional criteria," such as alcohol consumption as in the present case, in making its discretionary sentencing choices.

Here, based on the record in the re-sentencing hearing on remand, in particular, the trial court's observations and statements regarding defendant and alcohol, we find the trial court's decision was not irrational or arbitrary, and it properly considered defendant's alcohol use as an aggravating factor.

### ***Defendant's Criminal Record***

In addition to defendant's conviction for receiving stolen property and his alcohol consumption on the date of the incident as aggravating factors, the court also considered defendant's prior criminal convictions and found them to be "numerous and of increasing seriousness," pursuant to California Rules of Court, rule 4.421(b)(2). Specifically, the trial court found that defendant had been convicted of three prior felonies—two for residential burglary and one for receiving stolen property. In addition to the three prior felonies, defendant also had five convictions for misdemeanors—three for prowling, and two for driving with a suspended or revoked driver's license.

We find it was not arbitrary for the court to find defendant's eight prior criminal convictions as numerous for the purpose of aggravating defendant's sentence pursuant to California Rules of Court, rule 4.421(b)(2). Indeed, prior case law supports this conclusion. (See, e.g., *People v. Black* (2007) 41 Cal.4th 799, 818, fn. 7 [the court found two felony and three misdemeanor convictions were numerous for the purpose of California Rules of Court, rule 4.421(b)(2)].)

### ***The Victim's Vulnerability***

The final factor the court considered in aggravation was the fact that the victim was particularly vulnerable because the "burglary was early in the morning around 2:00 a.m. when she was at home."

In the context of California Rules of Court, rule 4.421(a)(3), "[p]articularly . . . means in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act." (*People v. Smith* (1979) 94 Cal.App.3d 433, 436.)

Because he did not object to the trial court's finding of vulnerability at sentencing, in order to overcome waiver, defendant asserts on appeal that his trial counsel was ineffective. To obtain reversal due to ineffective assistance of counsel, defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and then demonstrate a "reasonable probability" that but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Lucas* (1995) 12 Cal.4th 415, 436; *People v. Pope* (1979) 23 Cal.3d 412, 423-425.) When the claim of ineffective assistance of counsel is made on direct appeal, the claim will be sustained "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581; *People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Here, defendant cannot demonstrate prejudice by his counsel's failure to object to the court's finding of vulnerability. At sentencing, in finding the victim to be particularly vulnerable, the court relied on the fact that the victim was alone, sleeping at 2:00 a.m. when defendant burgled the home. These facts are supported by the record, and the court did not act arbitrarily or irrationally in concluding that the victim was vulnerable under the circumstances. Case law supports the trial court's finding in this case. (See, e.g., *People v. Salazar* (1983) 144 Cal.App.3d 799, 813.) Defendant cannot show that had his counsel objected, there was "reasonable probability" that the result of the proceeding would have been different. (*Strickland v. Washington, supra*, 466 U.S. 668, 691-692.)

We find based on the facts that the court did not act irrationally or arbitrarily in finding the victim to be particularly vulnerable in the present case pursuant to California Rules of Court, rule 4.421(a)(3). Therefore, the court's use of such factor to aggravate defendant's sentence was proper.

#### ***Imposition of the Upper Term Sentence Under Penal Code Section 1170***

Defendant asserts that even if the aggravating factors were properly considered in the present case, the court erred in imposing the upper term sentence through its retroactive application of the newly amended Penal Code section 1170. Defendant claims that the trial court violated the federal and state constitutional guaranties against ex post facto laws and his constitutional right to due process of law by sentencing him to an aggravated term, because it did so in reliance on the version of Penal Code section 1170 in effect at the time of sentencing rather than the version in effect in 1999, when he committed his crimes. He also claims that the Legislature's action in amending Penal Code section 1170 to provide for more punishment violates the constitutional guaranties against ex post facto laws.

In 1999, when defendant committed the crime for which he was sentenced in this case, former subdivision (b) of section 1170 of the Penal Code provided that "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms,



the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (Stats. 2004, ch. 747, § 1, No. 3, West’s Cal. Session Law, p. 4448.) In 2007, in response to the United States Supreme Court’s ruling in *Cunningham v. California* (2007) 549 U.S. 270 (Stats. 2007, ch. 3, § 1, No. 1 West’s Cal. Session Laws p. 4), the Legislature revised that provision to provide that the term to be imposed “shall rest within the sound discretion of the court.” (Stats. 2007, ch. 3, § 2, No. 1 West’s Cal. Session Laws, p. 4; § 1170, subd. (b).)

Defendant concedes that his claim may be foreclosed by *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), which held that when a conviction is remanded for resentencing under the current version of Penal Code section 1170, the trial court is to follow the current law and that doing so does not violate the ex post facto clauses of the California or United States Constitutions on which defendant relevantly relies here (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9). (*Sandoval, supra*, 41 Cal.4th at pp. 853, 857.) Defendant argues that even if that is true, he is challenging *Sandoval*’s rationale so as to preserve the claim for federal review.

We are bound to follow *Sandoval* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455). Therefore, we reject the claim that defendant’s sentence to the upper term for the aggravated assault charge violated ex post facto and due process constitutional guaranties.

The judgment is affirmed.

**DISPOSITION**

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.